IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. ~~1058~~ 110

In the Matter of the Application
of
TAK SHAN FONG,

Petitioner.

TAK SHAN FONG,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM B. MAHONEY,
Attorney for Petitioner,
Buffalo, New York.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, dated March 20, 1958, which reversed a final order of the District Court for the Southern District of New York, which latter Court granted the petition of Tak Shan Fong for naturalization as a United States citizen.

A formal decree admitting petitioner to citizenship was granted and entered in the District Court for the Southern District of New York (Hon. Thomas F. Murphy, D. J.)

on July 23, 1956. The judgment of reversal by the Court of Appeals directed that the case be remanded with direction to vacate the order and deny the petitioner's application for citizenship.

(A) Opinions Below.

The District Court did not render an opinion. The opinion of the Court of Appeals has not been officially reported. A copy thereof is hereby appended as Appendix A (pp. 11-14).

(B) Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked upon the following grounds:

(i) The judgment of the Court of Appeals was dated and entered March 20, 1958.

(ii) No order has been granted for a rehearing, nor has there been any order granted extending the time, within which, to petition for certiorari.

(iii) The jurisdiction of this Court to review the judgment herein by Writ of Certiorari is conferred under Sections 1 and 2 of Article III of the Constitution of the United States; Section 1254(1) of Title 28, U. S. C.; Section 2101(c) of Title 28, U. S. C., and Rule 19(1)(b) of the Rules of the Supreme Court of the United States.

(C) Questions Presented.

Is an applicant for naturalization under Public Law 86, 83rd Congress (1952), 8 U. S. C. A. 1440a, required to prove that his physical presence within the United States followed directly his lawful admission to the United States?

Does the statute, 8 U. S. C. A. 1440a, demand that lawful admission and physical presence sequence be immediately consecutive?

(D) Statute Involved.

Public Law 86, 83rd Congress, 67 Stat. 108, 8 U. S. C. § 1440a.

> "§ 1440a. Naturalization through active service in the armed forces after June 29, 1950; requirements and exceptions; proof of service
>
> Notwithstanding the provisions of sections 1421(d) and 1429 of this title, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all the requirements of this chapter, except that— * * *."

(E, G) Statement of the Case.

Petitioner Tak Shan Fong, a seaman and a native and citizen of China, *lawfully* entered the United States at Honolulu, Territory of Hawaii, on August 24, 1951. Shortly thereafter he departed on the vessel that brought him to Hawaii. Thereafter, and on January 27, 1952, he arrived at Newport News, Virginia, aboard the S. S. Ocean Star, upon which he was employed as a cabin boy. He requested and was granted shore leave. Upon returning to his ship he learned that it had departed from Newport News,

Virginia. The certificate of arrival as to petitioner designated that he was a deserting seaman. On June 8, 1952 he was apprehended, subsequently accorded a hearing, and a warrant of deportation was issued. He was inducted into the armed forces of the United States on May 4, 1953 and because of such induction the deportation proceedings abated. The petitioner served in the armed forces of the United States until May 3, 1955 and was honorably discharged from the United States Army.

Petitioner filed a petition for naturalization under Public Law 86, 83rd Congress, 67 Stat. 108; 8 U. S. C. § 1440a.

The Government, in opposing the petition, initially asserted that the petitioner had not made a lawful entry into the United States. Later, the Immigration and Naturalization Service learned that petitioner had lawfully entered the United States at Honolulu, Territory of Hawaii, on August 24, 1951 and departed therefrom prior to his entrance into the United States at Newport News, Virginia on or about January 27, 1952.

In Judge Murphy's findings of fact it was stated:

> "Petitioner has been lawfully admitted to the United States, to wit, at the Port of Honolulu, T. H., on August 24, 1951."

The Government then adopted the theory that lawful admission and physical presence sequence must be immediately consecutive, and that the petitoner's entry into the United States in January 1952 being allegedly unlawful, the petitioner had not met the requirements of the statute.

Judge Murphy directed that the petition for naturalization should be granted and an order to that effect was signed and entered July 23, 1956. On the same day the petitioner took the Oath of Allegiance and the certificate admitting petitioner to citizenship was issued. The order

of Judge Murphy was reversed by the Court of Appeals, Second Circuit, on March 20, 1958. The order of reversal directed that the order admitting petitioner to citizenship should be vacated and petitioner's application for citizenship should be denied.

(H) Reasons for Granting Writ.

The question involved in this case presents a substantial and important question of federal law which has not been, but should be, settled by this Court. Considerable conflict of opinion exists among the District Court Judges for the Southern District of New York, as well as among the Judges of the Court of Appeals for the Second Circuit, as to what constitutes compliance with the requirements of 8 U. S. C. § 1440a in order to justify either the granting or denial of a petition of naturalization. The decision of the Court of Appeals, Second Circuit, in *United States v. Boubaris*, 244 F. 2d 98, as well as the decision of the same Court in our present case, is also in conflict with *Petition for Naturalization of Manuel Tchakalian*, (California) 146 F. Supp. 501.

In *United States v. Boubaris (supra)*, Judge Hincks dissented (with opinion at pages 100-101). In our present case Chief Judge Clark was noted as concurring with the views expressed in the dissenting opinion of Judge Hincks in the *Boubaris* case (App. p. 13).

In the earliest reported case on the construction of this statute, *In Re Appolonio,* 128 F. Supp. 288, the petitioner, a seaman, overstayed his leave in 1947 and remained in the United States without legal authority to remain. In 1951 he was inducted into the United States Army; in 1952 he was arrested on a warrant in a deportation proceeding. A hearing was held and petitioner was paroled. He was

then shipped overseas and in 1953 was honorably discharged from the United States Army. In February, 1953 he was granted a hearing in the deportation proceedings and was found deportable. He then sought naturalization pursuant to Section 1440a of Title 8 U. S. C. The Government contended that he was not "lawfully" admitted within the meaning of the statute.

The Government's contention was rejected and his petition for naturalization was approved. No appeal was taken.

The Government asserted another theory for denial of naturalization to a person who served in the armed forces of the United States in *Petition for Naturalization of Zaino*, 131 F. Supp. 456, June 10, 1955. The petitioner was erroneously admitted to the United States in 1929; he served in the United States Army from 1950 to 1952 and was honorably discharged. He served part of his army service in Korea. The Government contended that his *lawful admission* to the United States must precede his year's physical presence and his entry into the armed forces.

The Government's contention was again rejected, Judge Dimock stating at page 457:

> "The statute, as literally read, makes no such requirement."

Still another theory, and a theory directly involved in our present case, was projected by the Government in *In Re Petition for Naturalization of Demetrios Boubaris*, 134 F. Supp. 613*, Sept. 20, 1955. In such case, petitioner entered this country lawfully on a seaman's pass and thereafter departed. Later he re-entered this country unlawfully. He was inducted into and served in the United States Army and was honorably discharged. He petitioned for naturalization, and the Immigration Service recom-

* Reversed 244 F. 2d 98 by divided Court.

mended denial on the ground that the single period of physical presence did not follow upon a lawful admission. This theory was rejected by Judge Edelstein and the petition was granted. The Government appealed from this order.

During the time that the appeal in the aforesaid case was pending, Chan Chick Shick applied for naturalization pursuant to the provisions of Section 1440a of Title 8 U. S. C. The petitioner entered the United States lawfully on a seaman's pass, stayed beyond the period designated in such pass, and was served with a warrant for deportation. A hearing was held and he was deported in February 1952; he returned in April 1952 and unlawfully entered the country. He remained in the United States until May 1953 when he was inducted into the United States Army wherein he served for two years and was honorably discharged in May 1955. The Government interposed the identical contention as made in the *Boubaris* case *(supra)*. This was overruled by Judge Levet in *Petition for Naturalization of Chan Chick Shick, also known as Chon Chich Shick,* 142 F. Supp. 410*, June 21, 1956, wherein he said at page 412:

> "In view of the liberal manner in which the Courts have interpreted 8 U. S. C. A. § 1440a, it is the opinion of this Court that the statutory period of physical presence need not commence immediately after the petitioner's lawful entry. Having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time he entered the Armed Forces, petitioner may be naturalized pursuant to the statute in question."

As heretofore noted, the Government appealed from the order granting the petition of *Boubaris (supra)*. The case

* Rev. opinion not reported. Appendix "A".

was argued before Judges Hincks, Lumbard and Waterman. The order of Judge Edelstein was reversed by a divided Court, with Judge Hincks delivering an opinion for affirmance (244 F. 2d, 98-100)*. Judge Lumbard, in writing for the majority for reversal, said at page 100:

> "The only fair construction of the statute requires that the lawful admission and physical presence sequence be immediately consecutive."

In contrast, Judge Hincks, in his opinion for affirmance, said at page 100:

> "Judge Edelstein found, and no one disputes, that in this case there was a literal compliance with the requirements of 8 U. S. C. A. § 1440a and granted the petition for naturalization. The Government appeals, however, on the ground—as stated in its brief—that the Act, *although it does not say so,* should be interpreted to require 'that the one year physical presence must directly follow a lawful admission to the country'." (Italics supplied)

Approximately one year subsequent to the Court's reversal in *U. S. v. Boubaris,* our present case and that of Chan Chick Shick were heard together with two of the same Judges, namely, Judges Lumbard and Waterman, sitting, who had heard the argument and decided the case of *U. S. v. Boubaris* (Appendix A). The *"Per Curiam"* opinion for reversal merely stated:

> "We have recently passed upon the question presented here in *United States v. Boubaris,* 244 F. 2d 98 (2 Cir. 1957) filed subsequent to both of the orders here in question, wherein we held that § 1440(a) of 8 U. S. C. A. required that the 'single period of at least one year' be immediately consecutive to the lawful admission required by that section. This continuity is concededly lacking in both of the present cases." (Appendix A, p. 13)

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* Judges Lumbard and Waterman, with Judge Moore, heard the argument on the appeal of *U. S. v. Chan Chick Shick* and our present case (Appendix A).

In this latter opinion, the following appears at App. p. 14:

> "The panel requesting consideration of these two cases by the entire court, the entire court on the authority of *United States v. Boubaris, supra,* unanimously declines such consideration. *Chief Judge Clark,* however, wishes to be noted as *concurring* with the views expressed in the *dissenting* opinion of Judge Hincks in that case, at 244 F. 2d 98, 100." (Italics supplied.)

We are confronted with a question as to the correct interpretation of the provisions of a Federal statute, namely, § 1440a, 8 U. S. C. A.

In Re Appolonio (supra) and *Petition of Zaino (supra),* Judges Dawson and Dimock, of the Southern District of New York, rejected the construction of § 1440a of Title 8 U. S. C. A. as urged by the Government. The main difference between the aforesaid cases and our present case was that both petitioners in such cases had served overseas and had re-entered the United States as members of the United States Army.

In the *Boubaris, Chan Chick Shick,* and *Fong* cases *(supra),* Judges Edelstein, Levet and Murphy placed an interpretation on the statute that lawful entry and physical presence did not have to occur consecutively. In the same cases, Judges Lumbard and Waterman held to the contrary. In the *Boubaris* case, Judge Hincks agreed with Judge Edelstein's interpretation of the statute and disagreed with Judges Lumbard and Waterman. In *Chan Chick Shick* and our present case (Fong), Chief Judge Clark concurred in the dissenting opinion of Judge Hincks in the *Boubaris* case.

There appears to be a decided unanimity of opinion by the District Court Judges for the Southern District of New York as to the interpretation to be placed upon

§ 1440a, Title 8 U. S. C. A. Such opinions are directly opposite to those of Judges Lumbard, Waterman and Moore of the Court of Appeals for the Second Circuit. Finally, Chief Judge Clark and Associate Judge Hincks are in accord with the interpretation resolved by the District Court Judges and in definite conflict with their associate Judges, Lumbard, Waterman and Moore.

CONCLUSION.

Petitioner respectfully submits that this case involves an important Federal question as to the correct interpretation of a statute, § 1440a, Title 8 U. S. C. A., which should be settled by this Court. That the Court of Appeals, by its decision, has read into this statute a provision which is not contained in the statute, and which provision was not within the contemplation of Congress at the time of the enactment of such statute. This Court's interpretation is essential and necessary for the guidance of District Courts and Courts of Appeal in similar cases arising in those Courts in the future.

Respectfully submitted,

WILLIAM B. MAHONEY,
Counsel for Petitioner.

Buffalo, New York,
June , 1958.

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 209-210—October Term, 1957.

(Argued March 6, 1958 Decided March 20, 1958.)

Docket Nos. 24883 and 24420

—o—

United States of America,

Respondent-Appellant,

v.

Chan Chick Shick, also known as Chon Chich Shick,

Petitioner-Appellee.

—o—

United States of America,

Respondent-Appellant,

v.

Tak Shan Fong,

Petitioner-Appellee.

—o—

Before:

Lumbard, Waterman and Moore,

Circuit Judges.

Appeals from orders of the District Court granting petitions for naturalization under 8 U. S. C. A. § 1440(a). Judge Richard H. Levet, Southern District of New York, granted the petition of Chan Chick Shick. Judge Thomas F. Murphy, Southern District of New York, granted the petition of Tak Shan Fong. Reversed. Motion for *en banc* hearing denied.

ROY BABITT, Special Assistant United States Attorney, Southern District of New York, New York, N. Y. (Paul W. Williams, United State Attorney, Southern District of New York, New York, N. Y. on the brief), *for respondent-appellant.*

ABRAHAM LEBENKOFF, New York, N. Y. (Jerome J. Coin, New York, N. Y. on the brief), *for petitioner-appellee Tak Shan Fong.*

PER CURIAM:

The appeals in these two cases were heard together as each case presented the same question of law.

Chan Chick Shick, a native and citizen of China, entered the United States at New York City on March 14, 1951 as a member of the crew of the S. S. Oriental Dragon. He was admitted to shore leave on a 29 day pass but remained longer than that period. On February 4, 1952 Chan Chick Shick was deported. He returned to the United States as a seaman on the S. S. Henry Jocelyn on April 1, 1952 and thereafter jumped ship, entered the United States unlawfully and remained in this country until May 4, 1953 when he was inducted into the United States Army. He served in the continental United States and was discharged on May 3, 1955. On August 17, 1955 Chan Chick Shick filed a petition for naturalization which was opposed by the government on the ground that 8 U. S. C. A. § 1440(a)[1] requir-

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[1] 8 U. S. C. A. §1440(a):
"Notwithstanding the provisions of sections 1421(d) and 1429 of this title, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully ad-

(Footnote continued on following page)

ed that the single period of physical presence of at least one year within the United States must commence immediately upon and be a result of the lawful admission. Judge Levet in an opinion dated June 21, 1956, reported at 142 F. Supp. 410 (S. D. N. Y. 1956) rejected this interpretation and granted the petition.

The same objections were raised by the government to the petition of Tak Shan Fong, which was granted without opinion by Judge Murphy, Southern District of New York, by order dated July 23, 1956.

Tak Shan Fong, also a citizen and native of China, had legally entered the United States on April 24, 1951. He departed and on January 27, 1952 he returned to the United States at Newport News, Virginia, as a cabin boy on the S. S. Ocean Star but he was detained aboard ship as a *mala fide* seaman. He escaped from the ship and entered the country illegally, remaining at large for some four months until he was apprehended on June 8, 1952. Deportation proceedings were thereupon instituted and a warrant of deportation was issued, but these proceedings were abated by the induction of the petitioner into the United States Army on May 4, 1953. All his service with the Army took place in the continental United States. After his discharge from the Army on May 3, 1955, he filed his petition for naturalization on December 22, 1955.

We have recently passed upon the question presented here in *United States v. Boubaris*, 244 F. 2d 98 (2 Cir. 1957) filed subsequent to both of the orders here in question, wherein we held that § 1440(a) of 8 U. S. C. A. re-

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(Footnote continued from preceding page)
mitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all the requirements of this chapter * * *".

quired that the "single period of at least one year" be immediately consecutive to the lawful admission required by that section. This continuity is concededly lacking in both of the present cases.

The orders appealed from are reversed and remanded with directions to dismiss the petitions.

The panel requesting consideration of these two cases by the entire court, the entire court on the authority of *United States* v. *Boubaris, supra*, unanimously declines such consideration. Chief Judge Clark, however, wishes to be noted as concurring with the views expressed in the dissenting opinion of Judge Hincks in that case, at 244 F. 2d 98, 100.